Supreme Court, U.S.
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No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, a Corporation,

RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hawaii Supreme Court refused discretionary review on December 13, 2007, over a dispute whether a state assumpsit fee-shifting statute applied to tort causes of action. The statute authorizes a "loser pay" attorney fee scheme for parties prevailing on claims for promissory notes or other contracts in writing with attorneys fees provisions and, vaguely, actions "in the nature of assumpsit". By affirming the trial and appellate courts' imposition of over $34,000 in fees in a lawsuit for insurer bad-faith, tortious interference and statutory tort, Hawaii's courts decided important Federal Questions against a physician in a way that conflicts with relevant decisions of this Court .

Five Questions Are Presented:

1. Does HRS §607- 14 on its face and as applied, violate the Due Process Clause of the United States Constitution on either of the following bases: (a) statute and court-created conditions leave broad and unlimited powers in the hands of judges to decide upon the vague language of the statute what the law should be. Giacco v. Pennsylvania, 382 U.S. 399, 401, 88 S.Ct. 518 (1966); Yick Wo v. Hopkins, 118 U.S. 356, 366 6 S.Ct. 1064 (1886); (b) the statute, on its face or as applied, penalizes causes of action for damages which are property interests protected by the 14th Amendment Due Process Clause (Logan v. Zimmerman Brush Co. et al, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153 (1982))?

2. Does the statute or its applied classification between owners of causes of action whose claims are, or are not, "in the nature of assumpsit" violate the Equal Protection Clause of the 14th Amendment and require strict scrutiny review, because of the impact on the Petition Clause or Expression Clause (advocacy) of the First Amendment, and upon the property rights to causes of action?

3. Does the statute's facial and applied classification between Petitioner versus other owners of causes of action which are only subjected to a 25% cap on attorneys fees, violate the Equal Protection Clause of the 14th Amendment and require strict scrutiny review because of the impact on the Petition Clause or Expression Clause (advocacy) of the First Amendment, and upon the property rights to causes of action?

4. Did the statute, or its application, single Petitioner or others out with animus or ill will for reasons wholly unrelated to any legitimate objective under Village of Willowbrook v. Olech, 582 U.S. 562, 120 S.Ct. 1073 (2003), or the Equal Protection Clause of the 14th Amendment of the United States Constitution?

5. Does HRS §607-14, on its face or as applied, burden the Petition or Expression Clause of the First Amendment by providing no warning which additional causes of action other than those enumerated therein be construed for fee-shifting by a

judge at the end of litigation as "in the nature of assumpsit"?

LIST OF PARTIES

The parties are listed in the caption, except Argonaut Insurance Company, which is no longer a party to these proceedings. 28 USC §2403 may apply in that the constitutionality of a statute of the State of Hawaii is drawn into question, and neither the state nor any agency, officer, or employee thereof is a party. The Attorney General of Hawaii will be served with this Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	xi
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	6
REASONS FOR ALLOWANCE OF THE WRIT.....	11
I. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW VIOLATED BY STATE OF HAWAII IN A WAY THAT CONFLICTS WITH THIS COURTS DECISIONS INVOLVING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	11
II. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW VIOLATED BY STATE OF HAWAII	

TABLE OF CONTENTS

Page

IN A WAY THAT CONFLICTS WITH THIS COURTS DECISIONS INVOLVING THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION 27

CONCLUSION 33

TABLE OF CITED AUTHORITIES

Cases

A.B. Small Co. v. American Sugar et al,
267 U.S. 233, 239, 45 S.Ct. 295 (1925) 17

BE&K Constr. Co. v. NLRB,
536 U.S. 516, 530, 122 S.Ct. 2390, 2399 (2002)...28, 29

Best Place, Inc. v. Penn Am. Ins. Co.,
82 Haw 120, 132, 920 P.2d 334,
346 (1996) 7, 8

Bill Johnson's Restaurants Inc. v. NLRB,
461 U.S. 731, 741, 103 S.Ct. 2161 (1983)..... 29

Canadian R.R. Co. v. Eggen,
252 U.S. 553, 40 S.Ct. 402 (1920) 14

Catron v. TOKIO Marine,
90 Haw 407, 410, 978 P.2d 845, 848 (1999)..... 6

TABLE OF CITED AUTHORITIES

Cases — Page

Carey v. Brown,
447 U.S. 455, 461, 100 S.Ct. 2286, 2291 (1980)..... 21

Christopher v. Harberry,
536 U.S. 403, 415 n.12, 122
S.Ct. 2179, 2189 n.12 (2003)..... 10

City of Cleburne et al v. Cleburne Living Center,
473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (1985) ... 20

Cramp v. Bd of Public Instruction etc,
368 U.S. 278, 287, 82 S.Ct. 275 (1961)..... 31

Dombrowski v. Fester,
380 U.S. 476, 490, 85 S.C.t 1116 (1965)..... 32

Exotics Hawaii-Kona Inc. v. E. I du Pont
de Nemours & Co.,104 Haw. 358, 361, 90
P.3d 250, 253 (2004)..... 29

FEC v. Wisconsin Right To Life
____, U.S. ____ 127 S.Ct. 2652 (4-25-07),
2007 U.S. LEXIS 8585 ****4 20

First National Bank v. Bellotti,
435 U.S. 765, 786, 986 S.Ct. 1407 (1978)..... 21, 32

Gentile v. State Bar of Nevada,
501 U.S. 1030, 1038, 111 S.Ct 2720,
2726 (1991)..... 11, 13

TABLE OF CITED AUTHORITIES

Cases **Page**

Giacco v. Pennsylvania,
382 U.S. 399, 401, 86
S.Ct 518 (1966)..... 12, 15, 16, 17, 18, 30

Gonzalez v. O Centro Espirto etc,
546 U.S. 418, 424, 126
S.Ct. 1211, 1217 (2006) 22, 33

Gore v. Bush,
531 U.S. 98, 105, 121 S.Ct. 525, 530 (2000)..... 22

Grayned v. City of Rockford,
408 U.S. 104, 108-109, 92
S.Ct. 2294 (1972)..... 16,17

Haw. Home Infusion Associates v. Befitel,
14 Haw 87, 89 157 P.3d 526, 528 (2007) 7, 26

Hartman v. Moore,
547 U.S. 250, 256, 126 S.Ct. 1695 (2006)..... 29

HMA v. HMSA,
113 Haw 77, 116, 148 P.3d
1179, 1221 (2006) 8, 27, 30

Jou v. Chang, 350 F.Supp.2d 862
(D.C. Haw. 2004)) 9

Jou v. DTRIC,
116 Haw 159, 170, 172 P3d 471, 482 (2007) 27

TABLE OF CITED AUTHORITIES

Cases **Page**

Jou v. National Interstate Insurance Company et al,
114 Haw 122, 134 157 P3d 561 (2007) 26

Kahala v. Goodsill etc,
113 Haw 251, 282, 151 P.3d
732, 783 (1-11-07) 8, 16, 17, 23, 30, 31

Keyishian v. Board of Regents etc,
385 U.S. 589, 599, 604 87 S.C.t 675
681, 684 (1967) 31

Kutcher v. Zimmerman,
87, Haw 394, 405 n.15, 957 P.2d 1076,
1087 n.5 (App 1998) 8

Leonen v. Johns-Manville Corp,
717 F.Supp. 272, 278 (D.N.J. 1989)..... 17

Liljeburg v. Health Services Acquisition Corp,
486 U.S. 847, 861, 865 fn 12, 108,
S.Ct. 2194, 2205 (1988)..... 26

Logan v. Zimmerman Brush Co.,
455 U.S. 422, 428, 102 S.Ct 1148, 1153 (1982).....14, 20

Mores v. Frederick,
127 S.Ct. 2618, 127 S.Ct. 2630 (2007)..... 33

McDonald v. Smith
472 U.S. 479, 482, 485, 105 S.C.t 2787 (1985)..... 28, 29

TABLE OF CITED AUTHORITIES

Cases	Page
NAACP v. Clairborne Hdw. Co., 458 U.S. 886, 911-915, 102 S.Ct. 3409 (1982).....	28
Orthopedics Associates et al v. HIG et al, 109 Haw 185, 190, 124 P3d 930, 935 (2005).....	24, 25, 26
Papachristou et al v. City of Jacksonville, 405 U.S. 156, 162, 166 n.8 92 S.Ct. 839, 843, 845 (1972).....	14
Redish v. City of Tacoma, 123 F.3d 1216, 1223 (9th Cir. 1997).....	21
Schulz v. Honsador Inc., 67 Haw 433, 690 P.2d 279 (1984) (overruled on other grounds, 96 Haw 327, 331, 31 P3d 184, 2001).....	13
Schad v. Borough of Mt. Ephram, 452 U.S. 61, 84 n.10, 101 S.Ct. 2176 (1981)	31
Steffel v. Thompson, 415 U.S. 152, 475, 94 S.Ct. 1209 (1974).....	30
Tulsa Prof. Coll. Serv. V. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1344 (1988)....	14

TABLE OF CITED AUTHORITIES

Cases **Page**

United Mine Workers Dist 12 v. Illinois Bar Ass'n,
389 U.S. 217, 222, 88 S.Ct. 353 (1967)..... 28

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S.Ct 1073 (2000)..... 23

Wayte v. United States,
470 U.S. 598, 610 fn 11, 105 S.Ct. 1524 (1985) 28

Wilkinson v. United States,
365 U.S. 399, 423, 427, 81
S.Ct. 567, 580, 583 (1961) 19

Yick Wo v. Hopkins,
118 U.S. 356, 366, 6 S.Ct. 1064 (1886)..... 15

STATUTES AND RULES

28 USC 1257(a) 1

U.S. Supreme Court Rule 10(b) 1

HRS §607-14 ..... 2, 6, 9, 12, 14, 15, 17, 19, 30, 31

HRS §663-1 ..... 4, 14

HRS §663-1.3 ..... 5, 19

TABLE OF APPENDICES

Page

APPENDIX A- Hawaii Supreme Court: ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI A.1-2
and
DISSENT BY ACOBA, J. (filed 12/13/07) A.1-9

APPENDIX B- Hawaii Intermediate Court of Appeals: JUDGMENT ON APPEAL (filed 8/1/07) B.1-2

APPENDIX C- Hawaii Intermediate Court of Appeals: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT-APPELLEE HEMIC'S REQUEST FOR ATTORNEY'S FEES AND ORDER GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE, REQUEST FOR COSTS ON APPEAL (filed 7/18/07) C.1-4

APPENDIX D- Hawaii Intermediate Court of Appeals: ORDER GRANTING DEFENDANT-APPELLEE MARRIOTT CLAIM SERVICES CORPOIRATION'S REQUEST FOR ATTORNEY'S FEES AND ORDER GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE, REQUEST FOR COSTS ON APPEAL (filed 7/18/07) D.1-4

TABLE OF APPENDICES

Page

APPENDIX E- Hawaii Intermediate Court of Appeals: ORDER GRANTING DEFENDANT-APPELLEE CITY AND COUNTY OF HONOLULU'S REQUEST FOR ATTORNEY'S FEES AND GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE REQUEST FOR COSTS ON APPEAL (filed 7/18/07) E.1-4

APPENDIX F- Hawaii Intermediate Court of Appeals: SUMMARY DISPOSITION ORDER (filed 4/5/07) F.1-5

APPENDIX G- 1st Circuit Court, State of Hawaii: JUDGMENT (filed 4/22/05) G.1-4

APPENDIX H- 1st Circuit Court, State of Hawaii: ORDER GRANTING DEFENDANT HEMIC'S MOTION FOR RECONSIDERATION REG ARDING HEIOC'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 25, 2004 (filed 3/21/05) H.1-3

APPENDIX I- 1st Circuit Court, State of Hawaii: ORDER DENYING PLAINTIFF EMERSON M.F. JOU, M.D.'S MOTION FOR LEAVE TO FILE SECOND DECLARATION PURSUANT TO HRS §601-7 TO DISQUALIFY AND TO VACATE ORDERS MADE BY THE HONORABLE GARY W.B. CHANG, FILED ON JANUARY 3, 2005 (filed 2/16/05) I.1-2

TABLE OF APPENDICES

Page

APPENDIX J- 1st Circuit Court, State of Hawaii:
ORDER DENYING PLAINTIFF ERSON M.F. JOU, M.D.'S MOTION FOR RECONSIDERATION; OR FOR RELIEF FROM ORDERS (1) GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 2, 2004, AND (2) GRANTING DEFENDANT HEMIC'S JOINDER TO DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEY'S FEES" FILED ON SEPTEMBER 9, 2004
(filed 11/30/04) J.1-3

APPENDIX K- 1st Circuit Court, State of Hawaii:
ORDER GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 2, 2004
(filed 8/31/04) K.1-2

APPENDIX L- 1st Circuit Court, State of Hawaii:

ORDER GRANTING DEFENDANT MARRIOTT CLAIMS SERVICE CORPORATION'S SUBSTANTIVE JOINDER IN DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 24, 2004, FILED HEREIN ON MARCH 11, 2004
(filed 8/31/04) L.1-3

TABLE OF APPENDICES

Page

APPENDIX M- 1st Circuit Court, State of Hawaii: ORDER GRANTING DEFENDANT HEMIC'S JOINDERTO DEFENDANT CITY AND COUNTY OF HONOLULU'SMOTION FOR ATTORNEYS' FEES FILED ON AUGUST 2, 2004 (filed 8/31/04) M.1-2

APPENDIX N- 1st Circuit Court, State of Hawaii: ORDER GRANTING DEFENDANT HEMIC'S MOTION FOR SUMMARY JUDGMENT FILED ON MAY 12, 2004 (filed 8/5/04) N.1-2

APPENDIX O- 1st Circuit Court, State of Hawaii: ORDER GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT FILED ON FEBRUARY 24, 2004 (filed 5/14/04) O.1-3

APPENDIX P- 1st Circuit Court, State of Hawaii: ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS CITY AND COUNTY OF HONOLULU, MARRIOTT CLAIMS SERVICES CORPORATION AND HEMIC, FILED FEBRUARY 17, 2004, AND DENYING WITHOUT PREJUDICE DEFENDANT MARRIOTT CLAIMS SERVICES CORPORATION'S MOTION FOR SUMMARY JUDGMENT FILED ON MARCH 11, 2004 (filed 4/15/04) P.1-3

TABLE OF APPENDICES

Page

APPENDIX Q- 1st Circuit Court, State of Hawaii:
ORDER DENYING PLAINTIFF EMERSON M. F. JOU, M.D.'S MOTION TO DISQUALIFY THE HONORABLE GARY W.B. CHANG ON CONSTITUTIONAL GROUNDS, FILED FEBRUARY 17, 2004 (filed 4/15/04) Q.1-3

APPENDIX R- 1st Circuit Court, State of Hawaii:
ORDER DENYING PLAINTIFF EMERSON M.F. JOU, M.D.'S MOTION FOR LEAVE TO AMEND COMPLAINT FILED ON SEPTEMBER 25, 2003 (filed 12/17/03) R.1-2

OPINIONS BELOW

The orders of the lower courts are at appendices A - F. A copy of the unpublished opinion of the Hawaii Intermediate Court Of Appeals is at appendix E. A copy of the Hawaii Supreme Court's unpublished order filed December 13, 2007, rejecting discretionary review is Appendix A pages 1,2. The dissent by Justice Acoba is at Appendix A, separately paginated at 1-9. Orders granting over $34,000.00 in assumpsit attorney fees to respondents are at appendices C to E.

STATEMENT OF JURISDICTION

This Court's jurisdiction is based on 28 USC 1257(a), or Rule 10(b) of this Court's Rules. The date of the Hawaii Supreme Court's order denying discretionary review is December 13, 2007.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment (Article I)

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Article XIV)

Section1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

§607-14. Attorneys' Fees In Actions In The Nature Of Assumpsit, Etc. Hawaii Revised Statues

In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall

then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.

Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed.

Where the note or other contract in writing provides for the recovery of attorneys' fees incurred in connection with a prior debt, those attorneys' fees shall not be allowed in the immediate action unless there was a writing authorizing those attorneys' fees before the prior debt was incurred. "Prior debt" for the purposes of this section is the principal amount of a debt not included in the immediate action.

The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the

amount sued for if the defendant obtains judgment.

Nothing in this section shall limit the recovery of reasonable attorneys' fees and costs by a planned community association and its members in actions for the collection of delinquent assessments, the foreclosure of any lien, or the enforcement of any provision of the association's governing documents, or affect any right of a prevailing party to recover attorneys' fees in excess of twenty-five per cent of the judgment pursuant to any statute that specifically provides that a prevailing party may recover all of its reasonable attorneys' fees. "Planned community association" for the purposes of this section means a nonprofit homeowners or community association existing pursuant to covenants running with the land.

§663-1. Torts, who may sue and for what, Hawaii Revised Statues

Except as otherwise provided, all persons residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses or reciprocal beneficiaries, children under majority, or wards, by such offending party, or the

offending party's child under majority, or by the offending party's command, or by the offending party's animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts.

§663-1.3. "Ad damnum" Clause Prohibited, Hawaii Revised Statues

(a) Notwithstanding any other provision of law, in any action based on tort, including a medical tort as defined in section 671-1, to recover damages for personal injuries or wrongful death, no complaint, counterclaim, cross claim or third party claim nor any amendment to such pleadings shall specify the amount of damages prayed for but shall contain a prayer for general relief, including a statement that the amount of damages is within the minimum jurisdictional limits of the court in which the action is brought.

(b) If the complaint, counterclaim, cross claim or third party claim or any amendment to such pleadings contains a specified amount of damages, the claim, counterclaim, cross claim or third party claim shall be dismissed by the court without prejudice; provided that, upon the filing of a motion to dismiss a complaint on the grounds of specificity of damages, the court shall allow the pleading to be amended in lieu of dismissal at the request of the claimant.

STATEMENT OF THE CASE

A. Material Facts

1. Petitioner Emerson M. Jou, M. D. asserts that the State of Hawaii injured him, by judicially recasting his lawsuit, sounding in tort, as one in the nature of assumpsit, thereby imposing $34,618.31 for insurance defense firms' attorneys' fees on him, under HRS §607-14: Appn A, Dissent Op. at pages 2-4.

2. On July 11, 2003, Petitioner sued respondents, in tort, in the First Circuit Court, State of Hawaii after they refused to pay him for physiatry services provided to injured workers. Respondents' excuse for their refusal to pay was that this licensed medical doctor needed, according to respondents, to be licensed as a massage establishment as well. At the time of filing the three tort causes of action as a result of this outrageous misconduct, Hawaii law allowed injured workers to sue workers' compensation insurers in tort for bad faith. Catron v. TOKIO Marine, 90 Haw 407, 410, 978 P.2d 845, 848 (1999). Whether workers physicians could sue the insurers was an open question at the time this suit was filed.

3. The services Petitioner provided were defined and billed under Current Procedural Terminology (AMA) as "therapeutic Procedures". A manner of effecting change through the application of clinical skills and/or services that attempts to improve function ... physician or therapist to have

direct (one on one) contact ... 97124 massage, including effleurage, pertrissage and/or tapotement (stroking compression percussion)"

4. Petitioner could not raise tort claims in the workers compensation system since it lacked jurisdiction. Indeed, even when the Hawaii Department of Labor and Industrial Relations (DLIR) had jurisdiction over non-tortious refusals to pay health providers, it denied health providers statutory appellate rights. Haw. Home Infusion Associates v. Befitel, 14 Haw 87, 89 157 P.3d 526, 528 (2007).

5. The complaint filed by Petitioner was never amended. Appn F.3. One party, Argonaut Insurance Company settled with Petitioner. On 5-14-04 (Appn O) and 8-5-04, the court filed its orders granting summary judgment in respondents' favor, on all of Petitioner's causes of action. These were: (1) insurer bad-faith, (2) tortious interference, and (3) statutory tort. Appn A, Dissent of Justice Acoba, pages 1 fn.2; 5; 7 and 8.

6. At the time Petitioner filed his suit captioned "Complaint In Tort For Insurer Bad Faith". It was, and still is, settled that insurer bad faith is an independent tort in Hawaii. Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw 120, 132, 920 P.2d 334, 346 (1996); also, Appn A, Dissenting Op. at page 6. The independence of the tort from any contract meant that the "implied covenant of good faith and fair dealing

is breached whether the carrier pays the claim or not ..." Best Place, 82 Haw at 132, 92 P.2d at 346.

7. Also, in the tort causes of action Petitioner filed on July 11, 2003, the tort Petitioner alleged against respondents for interference was not based on contract. Appn A (Dissenting Op at page 7). Interference with contractual relations, then and now, is a "subspecies of the broader tort of interference with prospective economic advantage." Kutcher v. Zimmerman, 87, Haw 394, 405 n.15, 957 P.2d 1076, 1087 n.5 (App 1998); also, HMA v. HMSA, 113 Haw 77, 116, 148 P.3d 1179, 1221 (2006) (physician/patient context). Assumpsit fees were specifically disallowed for this tort in Kahala v. Goodsill etc, 113 Haw 251, 282, 151 P.3d 732, 783 (1-11-07). Outrageously, assumpsit fees were allowed for this tort in this case about seven months later. Appn A. Dissenting Op. at 4; Appn C -E.

8. Finally, at the time suit was filed no statute, or any authority, determined that a statutory tort (Petitioner's third cause of action) was in the nature of assumpsit. In fact, the statute involved expressly provides: "all persons ... shall be personally responsible in damages, for trespass or injury, whether direct to the person or property of others ..." This is a new tort, not previously "allowed" by a published Hawaii decision.

9. On December 17, 2003, the trial court filed an order denying Petitioner's motion to amend

his complaint. Appn R. His motion to disqualify the trial judge filed 2-17-04 was denied (order filed 4-15-04, Appn. Q). After hearings on April 2, 2004 and May 12, 2004, the court filed orders granting respondents summary judgment motions. Appn. O (filed 5-14-04), Appn. N (filed 8-5-04).

10. On December 7, 2004, Petitioner filed an action in the United States District Court to enjoin enforcement of HRS §607-14 and to declare the statute unconstitutional. That case was dismissed without prejudice on December 10, 2004 on abstention grounds. Jou v. Chang, 350 F.Supp.2d 862 (D.C. Haw. 2004)).

B. Federal Questions Preserved In The State Courts

The Federal Questions sought to be reviewed here were raised in a court of the first instance, the Circuit Court of the First Circuit, State of Hawaii (trial court); in Hawaii's Intermediate Court of Appeals ("ICA"); and, in the Hawaii Supreme Court. The manner of raising these federal questions was as follows:

1. Trial Court:

Prior to the decision on attorney fees, Petitioner argued First Amendment vagueness and unbridled discretion at page 17 of a supplemental brief, filed October 20, 2004. He raised Fourteenth

Amendment Due Process Clause issues in the same document at pages 16 - 20. He argued the Fourteenth Amendment Equal Protection Clause violations at pages 10 - 15 of the same document. These arguments were made in other written submittals as well.

2. Hawaii Intermediate Court of Appeals (ICA)

Petitioner argued violations of the First Amendment Petition Clause at pages 29-30 of his opening brief filed on or about September 9, 2005. He argued First Amendment Expression Clause issues at page 31 of the same brief. Petitioner also argued violation of the Expression Clause and Petition Clause at pages 7-11 of his objections to respondents request for assumpsit attorneys' fees on appeal, filed 5-7-07 and 5-8-07.

Petitioner argued violations of the Fourteenth Amendment Due Process Clause at pages 33 through 34 of his opening brief. He argued violations of the Fourteenth Amendment Equal Protection Clause at pages 7 through 11 of his objections to respondents' request for fees on appeal filed 5-7-07 and 5-8-07.

3. Hawaii Supreme Court

Petitioner argued violations of the First Amendment in his application for discretionary review to the Hawaii Supreme Court filed October 29, 2007, at pages 9 and 10 (Petition/Expression Clause). Petitioner argued the Fourteenth Amendment Due

Process Clause at page 10 of the same application; and, he argued the Equal Protection Clause at pages 7 to 10, of the same document. Petitioner also incorporated constitutional arguments made in the ICA.

REASONS FOR ALLOWANCE OF THE WRIT

This Court has stated that its cases grounded on access to the courts have had numerous constitutional bases. Christopher v. Harberry, 536 U.S. 403, 415 n.12, 122 S.Ct. 2179, 2189 n.12 (2003). In the trial court, and through two levels of state appellate courts, Petitioner carefully asserted that taxing attorney fees against him based on an assumpsit fee-shifting statute, violated the following provisions of the Federal Constitution: First Amendment Petition Clause and Expression Clause (advocacy), Fourteenth Amendment Due Process Clause, and the Equal Protection Clause.

With the exception of minor appellate acknowledgment of some of the Federal Constitutional Questions (Appn A [dissenting op.] at 5 fn.5, Appn F.3, 4), the state courts evaded discussing the assertions that the assumpsit statute, on its face and as applied, violated the Federal Constitution. This contrasts with appellate courts' obligation to "make an independent examination of the whole record to resolve First Amendment issues. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038, 111 S.Ct 2720, 2726 (1991). This writ should be allowed to

resolve this tension from Hawaii's scheme of after-the-fact recasting of tort claims as "in the nature of assumpsit" as a pretext to impose significant attorneys fees on losing tort plaintiffs. Appn A (dissenting op) 2-4.

I. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW VIOLATED BY STATE OF HAWAII IN A WAY THAT CONFLICTS WITH THIS COURTS DECISIONS INVOLVING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Due Process Clause Of The Fourteenth Amendment Violation

HRS §607-14 is not a sanctions statute, like another section irrelevant here; that is, HRS §607-14.5. The prefatory language of HRS §607-14 provides: "In all the courts, in all actions, in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys fees to be paid by the losing party..." Emphasis added.

Because "in the nature of assumpsit" was not clearly expressed or defined by the Hawaii Legislature; and because this phrase lacks definite character it cannot be distinctly perceived either by Hawaii's courts or by those who petition them. For would-be litigants, whose causes of action are not within the statute's categories (promissory note or

other contract in writing) there is no understandable warning with fixed legal standards to notify anyone, including Petitioner, which new causes of action will be deemed by a state circuit court to be in the nature of assumpsit. This Court should allow this Writ, because the statute and its judicial gloss are in direct conflict with the relevant decisions of this Court; particularly, Giacco v. Pennsylvania, 382 U.S. 399, 401, 86 S.Ct 518 (1966). Additionally, the fees are imposed on litigants, as here, at the end of the case. This is after substantial attorneys' fees have been incurred. The courts give no consideration to the numerous requests that since the re-characterization was made on first impression that application would be prospective. Appn F at 4¶12. Schulz v. Honsador Inc., 67 Haw 433, 690 P.2d 279 (1984) (overruled on other grounds, 96 Haw 327, 331, 31 P3d 184, 2001).

The vague gateway to the abyss, is the phrase "in the nature of assumpsit" added after the statute was enacted by King Kamehameha in 1872. Id at 435. The King's original law was less vague, stating "in all actions of assumpsit". Id. Modernly, the statute is void for vagueness. Gentile, supra, 501 U.S. at 1048 (disciplinary rule).

Court decisions subsequent to the King's enactment nearly 140 years ago provide a single divining rod to anyone facing a judicial test after litigation over whether any causes of action might be "in the nature of assumpsit"; that is, the phrase can be interpreted in more than one way by even the most

learned jurists. Honsador, supra. Appn. A (dissent of Associate Justice Acoba) at pages 6 and 7.

The after-the-fact determination whether to suspend enforcement of the statute by fine distinctions over assumpsit, results in a heavy burden on protected property rights. Review by Certiorari should occur here because "a cause of action is a species of property protected by the Fourteenth Amendment Due Process Clause" Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct 1148, 1153 (1982). "A right of action to recover damages for an injury is property which the legislature has no power to destroy." Canadian R.R. Co. v. Eggen, 252 U.S. 553, 40 S.Ct. 402 (1920); Tulsa Prof. Coll. Serv. V. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1344 (1988). Compare HRS §607-14 with HRS §663-1.

The discretion to suspend enforcement of HRS §607-14 by a judge also burdens rights under the Petition Clause as well as to expression in the form of advocacy. Even for litigants who are able to accurately divine whether they will escape assumpsit fees, there will still be a forbearance from bringing other torts and claims wrongly decided to have been in the nature of assumpsit.

Because the statute chills and restricts First Amendment rights which are fundamental, the most stringent vagueness test should apply, Papachristou et al v. City of Jacksonville, 405 U.S. 156, 162, 166 n.8

92 S.Ct. 839, 843, 845 (1972). Since it impinged on the rights to petition state courts, the standards or warnings in the statute should have been more clearly marked. Id at 109. As in Giacco, 382 U.S. at 402 n3, this case also involves an equal protection challenge. This Court may, as in Giacco, reverse solely on due process grounds, without reaching the other violation(s). Id.

Interpretation that a tort suit for damages could be an assumpsit claim has never been expressed in HRS §607-14 since the King enacted it in 1872. Moreover, there is no language which authorizes the courts' ad hoc re-characterization of Petitioner's causes of action as being assumpsit claims, solely to impose attorney fees on him. In short, nothing but vague language ever permitted the courts to convert assumpsit to tort. This is a power "not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." Yick Wo v. Hopkins, 118 U.S. 356, 366, 6 S.Ct. 1064 (1886).

As in Giacco, 382 US at 403, subsequent court decisions cannot cure the constitutional failings of HRS §607-14. As demonstrated by the facts at Bench, "all of the so-called court-created conditions and standards still leave ... such broad and unlimited power" in the hands of judges. 382 US at 403. The effect is that judges "must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is" Id. Emphasis added.

Compare Appns C-E, where assumpsit fees were taxed by Hawaii's appellate court nearly six months after one of Petitioner's tort claims (interference) was determined not to be in the nature of assumpsit. Kahala v. Goodsill et al, 113 Haw at 282, 151 P.3d at 783.

The facts are analogous to those in Giacco v. Pennsylvania, supra, 382 US 399 at 401, where an ancient costs statute, as here, did not set out sufficient standards to constitutionally guide the courts or warn the public. Justice Black wrote for the Court in Giacco: "Certainly one of the most basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement". Id at 403.

Here a Hawaii King, and later the Legislature, delegated to judges the basic policy decision of using a statute to redesign common-law causes of action. Judges use the Hawaii statute here to pigeonhole causes of action as assumpsit claims on an *ad hoc* and subjective basis, with all the attendant dangers of arbitrary and discriminatory application. Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972).

While the costs were imposed in Giacco after a misdemeanor conviction, this Court clearly intended that the standards of due process under a vague statute must be met in both the criminal and civil context. Id at 402; A.B. Small Co. v. American Sugar et al, 267 U.S. 233, 239, 45 S.Ct. 295 (1925); Accord; Leonen v. Johns-Manville Corp, 717 F.Supp. 272, 278 (D.N.J. 1989).

There is no guidance from the statute at Bench, or precedents of the state courts, which causes of action, particularly tort claims, are in the nature of assumpsit. Kahala v. Goodsill et al, supra, 113 Haw at 282, 151 P3d at 783. After a Hawaii plaintiff loses a tort case, as here, he or she is subject to paying defendant's attorney fees once the judge or justice determines whether the tort causes of action are in the nature of assumpsit. If so, the court decides how much attorney fees to award.

While the statute loosely limits the judges' discretion to defined actions, and caps the awards at 25% of certain amounts, the cases show that these confusing but minimal standards are not, as Giacco mandates, "legally fixed" Giacco, supra 382 US at 402-403. The vagueness of HRS §607-14 also failed to warn which tort claims would result in taxing of assumpsit fees, and the suspension of the statute's 25% cap. An ordinary person preparing to file suit would have no notice which tort claims would be subject to this suspension of the 25% cap on the "loser pays"

scheme, crafted here by state courts. Secondly, the statute's lack of standards has resulted in arbitrary and capricious application by the courts, particularly in this case.

Had Petitioner known that his tort causes of action would be re-characterized by the state courts as assumpsit claims, he would have refrained from exercising his right to petition. "Vague laws trap the innocent by not providing fair warning ... if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them (footnote). A vague law impermissibly delegates basic policy matters to ... judges ... for resolution on an ad hoc and subjective basis" Grayned, supra 408 US at 108.

It is difficult to imagine how any citizen could have foretold which tort claims at Bench would be reclassified by the state courts as "in the nature of assumpsit". The unexpected and *ad hoc* application of the statute, unexplained by state appellate courts, must be resolved through review by this Court.

B. The Equal Protection Clause Of The Fourteenth Amendment Violation I

This Court should allow the writ because Hawaii's assumpsit fee statute, on its face and as applied, draws classifications that impose substantial burdens on the capacity of citizens owning tort causes of action, after they undergo the expense of litigation.

HRS §607 -14 was applied to Petitioner in an intentionally punitive manner, penalizing him for filing tort causes of action against state insurers and self-insurers. Petitioner was treated differently than other tort plaintiffs in the state whose causes of action are not, or would not, be "in the nature of assumpsit". Certiorari should be granted because the burden on fundamental rights and property interests requires searching examination under the Equal Protection Clause.

Additionally, the statute, as applied here, penalized Petitioner to a degree greater than the 25% allowed to other litigants by the statute. The courts thereby set up a special classification for Petitioner, and others so situated. There is thus a substantial class of persons to which the 25% cap is not applicable because state law prohibits tort plaintiffs from demanding an amount of judgment sought. HRS §663-1.3.

These classifications reflect the view that some tort litigants are not as worthy or deserving as others; and that some losing tort plaintiffs will pay more than the statutory cap of 25%, regardless of whether they are precluded by HRS §663-1.3 from stating the amount of the judgment they demand.

The statute burdens and impinges on fundamental rights under the Petition Clause and the Expression Clause (advocacy) of the First Amendment. Wilkinson v. United States, 365 U.S. 399,

423, 427, 81 S.Ct. 567, 580, 583 (1961) ("fundamental to the very idea of government, republican in form"). A strict scrutiny standard of review is thus required. City of Cleburne et al v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (1985). The burden on the First Amendment, even in an "as applied" context, subjects HRS §607-14 to strict scrutiny. FEC v. Wisconsin Right To Life ____, U.S. ____ 127 S.Ct. 2652 (4-25-07), 2007 U.S. LEXIS 8585 ****4. (Concurrence: Chief Justice Roberts). Heightened review is also required because causes of action are property rights protected by the Fourteenth Amendment Due Process Clause. Logan v. Zimmerman, supra, 455 U.S. at 428, 102 S.Ct. at 1153.

Drawing of lines which classified between those causes of action subject to the "loser pay" fees scheme in an assumpsit statute is peculiarly a legislative task. Since the Hawaii Legislature delegated to the judiciary its duty of making the classification between which litigants' causes of action, including tort claims, are "in the nature of assumpsit", the statute is not a valid fee-shifting law, providing reasonable notice in advance which claims will be treated differently from the American Rule (each party bears its own fees).

It is only *after* undertaking the painstaking burden and expense of litiganting tort claims, followed by a dismissal, that Petitioner and other state litigants find out whether they guessed right. The prejudice and antipathy reflected by the litigation

over this statute, in both trial and appellate courts, shows no concern at all for the Petition Clause the Expression Clause; or even the basic decency of applying fees to reclassified causes of action prospectively. Appn. F at 4 ¶12. Certiorari review would thus provide the missing critical scrutiny demanded under accepted First Amendment and Equal Protection principles. First National Bank v. Bellotti, 435 U.S. 765, 786, 986 S.Ct. 1407 (1978).

Review accorded to speech related activities should result in scrutiny no less strict in the context of the Petition Clause or Expression Clause. The Ninth Circuit, for example, does not elevate the right to litigate above the right to free speech. Redish v. City of Tacoma, 123 F.3d 1216, 1223 (9th Cir. 1997). The strict scrutiny standard in Carey v. Brown, 447 U.S. 455, 461, 100 S.Ct. 2286, 2291 (1980) is applicable:

> "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Emphasis added.

Fine tailoring of which causes of action are classified as "in the nature of assumpsit" is required, in view of the fundamental interest in the property rights at stake. The distinctions drawn by the face of

the statute, and as it is applied to tort claims, show that after-the-fact classifications made between some litigants with tort causes of action versus other tort victims, do not further a compelling government interest; nor are the classifications the least restrictive means employed to serve that interest. Gonzalez v. O Centro Espirto etc, 546 U.S. 418, 424, 126 S.Ct. 1211, 1217 (2006). Merely describing things in the statute would not have sufficed here because the conduct by the state courts does not meet a "minimum requirement for non-arbitrary treatment ... necessary to secure the fundamental right". Gore v. Bush, 531 U.S. 98, 105, 121 S.Ct. 525, 530 (2000).

C. Equal Protection Violation Clause Of The Fourteenth Amendment Violation II

As an additional ground to allow Certiorari review, the state's action here was motivated by a spiteful effort to chill tort and insurance litigation in Hawaii; particularly, litigation brought by health providers over payment delays and denials.

Under the lowest standard of equal protection review, there has never been articulated a legitimate state objective to penalize Petitioner by imposing fee-shifting, after a first-time decision that three tort causes of action were "in the nature of assumpsit".

The discriminatory treatment accorded to Petitioner as opposed to others with similar claims

(Kahala v. Goodsill et al, supra) is not based on membership in a suspect class. It is based on being a member of a class of unpaid health providers in Hawaii; or, simply being a class of one. Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct 1073 (2000).

On January 28, 2007, the Honolulu advertiser reported "the failing health of many private medical practices in Hawaii is driving physicians out of the state..." Honoluluadvertiser.com. As of October of 2004, of over 120,000 people in the State of Hawaii who were uninsured, about 31,000 were working adults. Honoluluadvertiser.com (10-14-04). The state's population is about 1.2 million. In 2002, Hawaii hospitals lost about 95 million due to uncompensated care. www.healthcoveragehawaii.com.

Several things are driving health professionals out of the state: (a) low healthcare reimbursement from casualty (workers compensation and automobile) and health insurance companies, (b) excessive, poorly regulated medical malpractice rates, and (c) a judiciary strongly biased in favor of insurance companies; particularly those in (a) above.

There is also a systemic bias by Hawaii state government employees in favor of insurance companies (who lobby aggressively) which stems from premium discounts and premium "holidays", provided by the insurers. There are also fraudulent, perhaps criminal, overpayments and "off the plan" coverage provided for drugs and vitamins. In 2002

alone, an audit found that the state's largest health insurer (which covers over half the state) overpaid government employees' claims up to $390,374.38, and provided $5,343.53 in prescriptions for off the plan "sexual dysfunction products", vitamins and diet pills. This audit was corroborated by allegations in Kina v. HMSA, No. 26341, Hawaii Intermediate Court of Appeals 2006. Haw. App. LEXIS 484 (9-5-06) page 8 (unpublished). The FBI and its public corruption unit have not revealed if anyone is investigating this, despite complaints and inquiries.

The most egregious source of systemic bias is that the nine-member Hawaii Judicial Selection Commission has exclusive control over the 10 year reappointment of appellate justices and trial judges, with the exception of the six-year terms for the lower court judges. At one point in this litigation, this Commission was packed 4:9 by representatives of the same insurers who systematically deny and delay the already low rates of reimbursement to Hawaii's health providers. A name partner of the firm representing Marriott Claims (respondent) chaired the Hawaii Judicial Selection Commission during this dispute.

One of the defendants in Orthopedics Associates et al v. HIG et al, 109 Haw 185, 190, 124 P3d 930, 935 (2005) was a local casualty insurer, Island Insurance Company Limited ("Island Insurance"). On April 15 1998, the Orthopedics suit was filed in the First Circuit, State of Hawaii against

Island Insurance and other insurers. The appellate opinion in Orthopedics was authored (nearly 7 years later) by Hawaii Supreme Court Chief Justice Ronald T. Y. Moon. The dispute, as here, was over nonpayment of valid health claims. The case is still unresolved in the trial court, on remand.

After the Orthopedics case was filed, Chief Justice Moon appointed a vice president of Island Insurance, Lois Suzawa, to the Hawaii Judicial Selection Commission. Island Insurance's vice president started her six year term on the state's commission on April 2, 2001. Shortly afterward, on August 30, 2001, the trial court dismissed the Orthopedics case. It languished on interlocutory appeal from the filing of the notice of appeal, on October 18, 2001, to the date of Justice Moon's decision, December 7, 2005. The 30,000 or so medical bills involved remained unpaid. 109 Haw at 191, 124 P3d at 936.

Since Hawaii has yet to legislatively prevent litigants (particularly those providing health coverage) from taking turns on the states Judicial Selection Commission, any judge or justice desiring another term can readily predict that insurers appearing before them may be represented on the Commission by the end of the jurist's term. Petitioner made this clear in a pleading filed in the trial court on January 20, 2005, as well is on appeal. Appn. F page 3. Opening Brief (state) at 26.

It is against this backdrop that Hawaii physicians and other health providers are being systematically chilled from the exercise of their right to petition state courts. Since the judge assigned to this case had formerly served as an insurance defense attorney, Petitioner moved for disqualification. Appn. L pages 2 and 3. Appn I and Q. While oral argument on the recusal motion provided the judge with the opportunity to make disclosures, he did not reveal that he had previously represented one of the parties to this suit (respondent City and County of Honolulu). Instead, the Judge granted his *former client* $5,321.50 in attorneys' fees. Appn A, Dissenting Op. at 2. When Petitioner discovered the conflict, and raised the issue, the judge again, refused to disqualify himself. This alone requires that the fee orders be vacated. Liljeburg v. Health Services Acquisition Corp, 486 U.S. 847, 861, 865 fn 12, 108, S.Ct. 2194, 2205 (1988).

While health providers are leaving the state, and about 10% of Hawaii's residents are uninsured, state courts and administrative agencies have worked hard to systematically frighten and intimidate health providers; and to create numerous common-law defenses and delaying procedures beneficial to the insurance industry. A few of the cases are: Orthopedics Associates, supra (remanded); Haw. Home Infusion Associates v. Befitel, supra, 114 Haw at 89, 157 P3d 528 (declining jurisdiction in case involving lack of appeals from individual

administrator's denials of medical bills, at labor department); Jou v. National Interstate Insurance Company et al, 114 Haw 122, 134 157 P3d 561 (2007) (physicians cannot sue worker's compensation insurer for insurer bad faith since physician is merely an incidental beneficiary); Jou v. DTRIC, 116 Haw 159, 170, 172 P3d 471, 482 (2007) (physicians may not sue auto insurers in tort since they are not third-party beneficiaries); HMA v. HMSA, supra, 113 Haw at 116, 148 P3d at 1221 ("allows" tortious interference against insurer by health providers - with restrictions).

Hundreds of thousands of American citizens living in Hawaii are being threatened by this, and other cases, with "loser pay" attorneys' fees should they sue insurers, or their insureds, over health benefits. The pain felt by these citizens and their health providers is not shared equally. The appellate courts were informed in a reply brief filed 12-1-05 in this case, that in 2002 state insurers only paid $708,842,399.00 in claims benefits, exclusive of life and annuity insurance, against premium earnings of $1,981,739,030.00.

II. REVIEW IS WARRANTED TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW VIOLATED BY STATE OF HAWAII IN A WAY THAT CONFLICTS WITH THIS COURTS DECISIONS INVOLVING THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Review should be granted here because the attorney's fees awarded to respondents under Hawaii's assumpsit statute penalized Petitioner for exercising his right to petition state courts. This right to petition, as well as a right to free speech, are separate but related guaranties generally subject to the same constitutional analysis. Wayte v. United States, 470 U.S. 598, 610 fn 11, 105 S.Ct. 1524 (1985); NAACP v. Clairborne Hdw. Co., 458 U.S. 886, 911-915, 102 S.Ct. 3409 (1982).

The right to petition is "among the most precious liberties safeguarded by the 'Bill of Rights' and intimately connected both in origin and purpose with the other First Amendment rights of free speech and the free press" United Mine Workers Dist 12 v. Illinois Bar Ass'n, 389 U.S. 217, 222, 88 S.Ct. 353 (1967). And, there is no sound basis to grant greater protection to statements made in a petition than other First Amendment expressions. McDonald v. Smith 472 U.S. 479, 482, 485, 105 S.C.t 2787 (1985). Review should be granted because Hawaii courts violated the precept that the tort complaint brought by Petitioner, was a form of protected petitioning activity. Id 472 U.S. at 484.

The attorney fee award in favor of respondents, while imposed after-the-fact, falls within this Court's power to review the action as a penalty on petitioning. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 530, 122 S.Ct. 2390, 2399 (2002). While BE&K intimated that greater protection is warranted when a

lawsuit is enjoined, the baseline for after-the-fact litigation penalties is at least coequal to other First Amendment violations which do not involve prior restraint. 536 U.S. at 530.

Hawaii's *ad hoc* imposition of assumpsit attorney fees on tort claims resulted from litigating in state court; that is, exercising a right "cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression". McDonald v. Smith, supra, 472 U.S. at 482. The unlawful penalty at the conclusion of litigation logically retaliated for filing suit in the first place. Retaliation against the exercise of the right to access the courts is an actionable wrong under 42 USC §1983. Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695 (2006). The right of access is an aspect of the right to petition under the First Amendment. Bill Johnson's Restaurants Inc. v. NLRB, 461 U.S. 731, 741, 103 S.Ct. 2161 (1983).

Viewed prospectively, the arbitrary and capricious imposition of attorneys' fees against Petitioner (by recasting his lawsuit as one in assumpsit) works as the prior restraint analogized in BK&K, supra, 536 U.S. at 530. Because Hawaii has adopted the doctrine of non-mutual offensive collateral estoppel, any lawsuit brought by Petitioner in the future for the same torts is likely to suffer the same unconstitutional fate, so as to act as a prior restraint on the Petition Clause. Exotics Hawaii-Kona Inc. v. E. I du Pont de Nemours & Co.,104 Haw. 358,

361, 90 P.3d 250, 253 (2004). Likewise, an entire class of health providers, who Hawaii courts "allow" to sue for the tort of interference, are now chilled from filing suits on this ground. Interference, has been classified as an assumpsit case, solely to tax "loser pays" attorneys' fees. While Hawaii health providers may bring tortious interference suits as allowed by HMA v. HMSA, supra, 113 Haw at 116, 148 P3d at 1221, this case teaches that the Hawaii courts do not have to follow Kahala v. Goodsill, supra, 113 Haw at 282, 151 P3d at 783 when taxing attorneys' fees. The standards are not "fixed" as Giacco, supra, requires.

This Court should allow the Writ because the statute, on its face, gave no advance warning that a tort plaintiff would be subject to assumpsit attorney fees. Nor do the interpretive decisions cure the deficiencies. Id. Petitioner is not required to prove others would be chilled from filing tort lawsuits in Hawaii's courts. "The solitary individual who suffers a deprivation is no less deserving of redress than one who suffers together with others" Steffel v. Thompson, 415 U.S. 152, 475, 94 S.Ct. 1209 (1974).

Review is necessary to address whether tort victims, as well as Petitioner, should have to gamble over whether at the end of litigation a state judge will, as here, recast their causes of action as being in the nature of assumpsit. Tort victims are not informed by the statute or decisions thereunder whether a judge can force a losing tort plaintiff to pay the other side's attorney fees, as this record demonstrates. It is

unknowable ahead of time which claims will be recast. Certainly numerous tort causes of action protected by the Petition Clause are subject to standardless, *ad hoc*, judicial classification. "Words which are vague and fluid... may be as much of a trap for the innocent as the ancient laws of Caligula". Cramp v. Bd of Public Instruction etc, 368 U.S. 278, 287, 82 S.Ct. 275 (1961). The annotations under HRS §607-14 attest to almost incomprehensible "fluidity". Compare the present facts with Kahala v. Goodsill, supra, 113 Haw at 282, 151 P3d at 783.

The phrase "in the nature of assumpsit" in the statute, as its judicial gloss proves, has virtually no limit. "Stricter standards of permissible statutory vagueness may be applied to the statute having a potentially limiting effect on speech ..." Keyishian v. Board of Regents etc, 385 U.S. 589, 599, 604 87 S.C.t 675 681, 684 (1967). This Court's scrutiny is necessary because a statute may not have, as its only standard, the unbridled discretion of a government official. Schad v. Borough of Mt. Ephram, 452 U.S. 61, 84 n.10, 101 S.Ct. 2176 (1981) (concurring opinion). The phrase "in the nature of assumpsit" is the same type of open-ended authorization for unfettered discretion, condemned in Schad.

The Writ should be allowed because there is a considerable burden caused by the facial overbreadth of the statutory phrase, "in all actions in the nature of assumpsit". This chills activity protected by the Petition Clause. Thousands of Hawaii's tort victims

are inhibited by the fact that their causes of action, at the end of litigation, may be reclassified by a state trial judge as being "in the nature of assumpsit" solely to tax losing tort victims with insurance defense firms' fees.

The statute suffers from overbreadth because while it attempts to make losers pay in assumpsit and other defined actions, its vague language reaches to tort cases. Since "in the nature" may be interpreted as extending to non-assumpsit causes of action, as here, some of this overbreadth is due to vagueness. HRS §607-14 and its application chills the exercise of the Petition Clause; thus, special precision was required to identify causes of action other than "actions on a promissory note or other contract in writing that provides for attorney fees". Without these standards, and the allowance of this Writ, courts will continue enforcing the statute in an arbitrary and discriminatory manner.

Review by this Court is imperative because no readily apparent construction suggests itself as a vehicle for rehabilitating the statute. Dombrowski v. Fester, 380 U.S. 476, 490, 85 S.C.t 1116 (1965). The statute, as this case shows, was too vague as written, and insufficiently narrow as applied. Id at 491 n.7 (no fair warning). By evading the Federal Constitutional questions, duly presented to them, the state courts failed and refused to make "the critical scrutiny demanded under accepted First Amendment principles" First National Bank v. Belloti, supra, 435

U.S. at 786, 98 S.Ct. 1407. For example, the state court's decisions were devoid of any showing that applying this fee-shifting statute to torts on a case-by-case basis was (1) in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering this interest. Gonzales v. O Centro Espirito etc, supra, 546 U.S. at 424, 126 S.Ct. at 1217.

There was no reason for the state judges to bypass reasoned analysis of the First Amendment issues duly raised. This amendment was applied to all states since ratification of the Fourteenth Amendment. Mores v. Frederick, 127 S.Ct. 2618, 127 S.Ct. 2630 (2007).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court of the United States grant review of this matter.

Dated: Honolulu, Hawaii, March 10, 2008.

Respectfully Submitted,

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EMERSON M.F., JOU, M.D.

FILED

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NO. 27281

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, M.D.,
Plaintiff-Appellant-Petitioner,

vs.

ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, a Corporation,

Defendants-Appellees-Respondents.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CIV. NO. 03-1-1445)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

(By: Levinson, J., for the court,

and Acoba, J., dissenting[1])

Upon consideration of the application for writ of certiorari filed on October 29, 2007, by the plaintiff-appellant-petitioner Emerson M.F. Jou, M.D., the application is hereby rejected.

DATED: Honolulu, Hawai'i, December 13, 2007.

FOR THE COURT:

STEVEN H LEVINSON.

Associate

Stephen M. Shaw,
for the plaintiff-appellant-petitioner
Emerson M. F. Jou, M.D.,
on the application

Richard F. Nakamura and
Steven L. Goto of Ayabe, Chong,
Nishimoto, Sia & Nakamura, for
the defendant-appellee-respondent
Mariott Claim Services Corporation,
on the opposition

Considered by: Moon, C.J., Levinson,
Nakayama, Acoba, and Duffy, JJ.

John Reyes-Burke of
Burke McPheeters Bordner & Estes,
for the defendant-appellee-respondent
HEMIC, aka Hawaii Employers Medical
Insurance Company on the joinder to
the memorandum in opposition
to the application

DISSENT BY ACOBA, J.

I respectfully disagree that the application for writ of certiorari submitted by Plaintiff-Appellant-Petitioner Emerson M.F. Jou, M.D. (Petitioner) should be denied. This court should further review the summary disposition order of the Intermediate Court of Appeals (ICA) affirming the award of attorneys' fees by the Circuit Court of the First Circuit (the court)[1] to Defendants-Appellees-Respondents City and County of Honolulu (the City) and Hawaii Employers Medical Insurance Company (HEMIC), pursuant to Hawai'i Revised Statutes (HRS) § 607-14 (Supp. 1997) and the ICA's orders granting the motions for attorneys' fees on appeal filed by the City, HEMIC, and Marriott Claim Services Corporation (Marriott) [the City, HEMIC, and Marriott are hereinafter collectively referred to as "the insurers"] pursuant to HRS § 607-14 because the complaint sounded in tort rather than assumpsit as required under HRS §607-14. The bad faith claim, tortious interference with a prospective business advantage claim, and statutory tort claim under HRS§ 663-1 (Supp. 1997)[2] asserted by Petitioner brought against the insurers were all tort claims rather than assumpsit claim.

Footnote

1. The Honorable Gary W.B. Chang presided.

2. Although Petitioner in his complaint cites HRS §463-1 (1993 & Supp. 2004) in reference to his statutory tort claim, the record indicates that he meant to cite HRS §663-1 (Supp. 1997).

I.

Petitioner' s action arises from the alleged failure of the insurers to pay for massage therapy services Petitioner rendered to certain clients where payment was allegedly owed pursuant to workers' compensation policies. The insurers refused to pay on the basis that Petitioner did not have a massage therapy establishment license as required under HRS §452-3 (1993) [3].

On July 11, 2003, Petitioner filed a complaint against insurers entitled, "COMPLAINT IN TORT FOR INSURER BAD FAITH," alleging bad faith, tortious interference with a prospective business advantage, and statutory tort. In his prayer for relief, Petitioner sought (1) actual damages, (2) punitive damages, (3) attorneys' fees and costs, and (4) other relief as the court deemed proper.

The court granted the City's motion for summary judgment on May 14, 2004, Marriott's substantive joinder to the City's motion for' summary judgment on August 30, 2004, and, HEMIC's motion for summary judgment on August 5, 2004. On August 2, 2004, the City moved for attorneys' fees under HRS §607-14 and HEMIC filed a substantive joinder to that motion on August 17, 2004. In its orders of August 31, 2004, the court granted the City's motion and HEMIC' joinder, awarding the City its requested attorneys' fees of $5,321.50. Petitioner filed a

Footnotes

3. HRS §452-3 (1993) provides that "[n]o massage therapy establishment shall be operated unless it has been duly licensed as provided for in this chapter."

motion for reconsideration of the court's decision to grant the City's motion for attorneys' fees and HEMIC's joinder.

On August 25, 2004, HEMIC moved for attorneys' fees in the amount of $9,491.50 under HRS §607-14. The court granted in part and denied in part HEMIC's motion on September 22, 2004, awarding HEMIC $855.00 in attorneys' fees. On October 6, 2004, the court invited HEMIC to move for reconsideration of its motion for attorneys' fees because in the court's view, the amount of punitive damages sought should have been taken into account in determining the amount in controversy upon which the twenty-five percent limitation on attorneys' fees is based, pursuant to HRS §607-14. The court heard Petitioner's and HEMIC's motion for reconsideration of HEMIC's attorneys' fees motion on November 8, 2004 and awarded HEMIC $8,750.00 in attorneys' fees.

On appeal before the ICA, Petitioner asserted in his opening brief, inter alia, that the court erred by (1) granting the City's motion for attorneys' fees, (2) granting in part and denying in part HEMIC's motion for attorneys' fees, (3) granting HEMIC's motion for reconsideration of its motion for attorneys' fees, and (4) denying his motion for reconsideration of the attorneys' fees orders against him.

Appendix A .3 (Dissent)

The City, HEMIC, and Marriott moved for attorneys' fees on appeal in the amount of $6,204.09, $9,791.72, and $4,451.50, respectively. The ICA granted all of the attorneys' fees requested by the insurers, again pursuant to HRS §607-14, with the exception of that portion of HEMIC's attorneys' fees relating to the state general excise tax.

II.

In his application for writ of certiorari before this court, Petitioner argues, inter alia, that the court and the ICA erred in awarding attorneys' fees because (1) the action was not in the nature of assumpsit within the meaning of HRS § 607-14; (2) HRS § 386-93(a) (1993)[4] precludes an .award of attorneys' fees under HRS § 607-14; (3) the court and the ICA should have apportioned fees among assumpsit and non-assumpsit claims.[5]

III.

All of Petitioner's claims against the insurers are tort claims notwithstanding the fact that it was alleged the insurers violated insurance contract obligations owed to Petitioner's clients and intended to benefit Petitioner as a third-party beneficiary to the contract. In light of the fact that all of the claims are clearly tort claims, no court is at

Footnotes

4. HRS §386-93(a) (1993) states as follows:

If the director of labor and industrial relations, appellate board or any court finds that proceedings under this chapter have been brought, prosecuted, or

defended without reasonable ground the whole costs of the proceedings may be assessed against the party who has so brought, prosecuted, or defended the proceedings.

5. Petitioner also argued that (4) the court's and: the ICA's conclusion that the action is in the nature of assumpsit should be applied prospectively; (5) it was a violation of Petitioner's rights under the fourteenth amendment to the United States Constitution for the court and the ICA to award attorneys' fees to the insurers; and (6) the attorneys' fees requested by the insurers was excessive.

---

liberty to reclassify those claims as assumpsit claims on the ground that the tort claims would not be actionable without the existence of an insurance contract between insurers and employers of Petitioner's clients.

A.

With respect to Petitioner's bad faith claim, Petitioner stated in his complaint that

> 9. At all times, [the insurers] owed a duty of good faith and fair dealing to [Petitioner]f as their intended third-party beneficiary, to pay for medical services [Petitioner] rendered to (the insurers'] other intended beneficiaries.
>
> 10. In breach, or in circumvention of this duty, and without proper cause, (the insurers] are unreasonably avoiding and

> refusing payment, to [Petitioner] for medical services rendered, thus committing the independent tort of Insurer Bad Faith.

(Emphasis added). In Best Place, Inc. v. Penn Am. Ins.Co., 82 Hawaii 120, 132, 920 P.2d 334, 346 (1996), this court said "there is a legal duty, implied in a a first-and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action." (Emphasis added.)

Petitioner's bad faith claim was presented as a tort claim inasmuch as Petitioner's complaint entitled "COMPLAINT IN TORT FOR INSURER BAD FAITH" (emphasis added), alleged that the insurers had committed the "independent tort of Insurer Bad Faith[,]" alleged consequences arising from the insurers' "tortious conduct[,]" and requested punitive damages.

It may be contended that Petitioner's bad faith claim is a claim in the nature of assumpsit because in requesting attorneys' fees, Petitioner's prayer did not expressly state that he sought actual damages that included attorney's fees, and Petitioner therefore arguably sought attorney's fees that were in addition to actual tort damages. However, at the November 8, 2004 hearing on the issue of HEMIC's motion for reconsideration of its attorneys' fees, Petitioner cited California case law, arguing that such authority held that "attorney's fees in a bad faith case are an element of damage." Indeed, the California Supreme Court's

decision in Brandt v. Superior Court, 693 P.2d 796 (Cal. 1985), which explained that an insurer may be liable in a tort action for attorneys' fees, excluding the fees incurred in bringing the bad faith action itself) if the "insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy[.]" Id. at 798. See also Uyemura v. Wick, 57 Haw. 102, 108-09, 551, P.2d 171, 176 (1976) (allowing for the recovery of attorneys' fees in contract and tort actions where wrongful acts of the defendant involve the plaintiff in litigation with third parties). The mere fact that Petitioner requested attorneys' fees in the prayer of his complaint is not a reasoned basis for deciding that Petitioner's bad faith claim is not a tort claim, particularly in light of the fact that Petitioner clearly alleges an action in tort and Petitioner has cited authority for an award of attorneys' fees on a tort claim.

B. –

With respect to Petitioner's tortious interference claim, Petitioner alleges in his complaint that:

> 20. There existed a prospective advantage, expectancy, or professional relationship sufficiently definite, specific, and capable of acceptance by patients insured by [the insurers); in the sense that there was a reasonable probability of it maturing into a future benefit to both [Petitioner) and the patient.

> 22. [The insurers] purposefully[,] maliciously or recklessly intended to interfere with the advantage, relationship or expectancy.

With respect to Petitioner's statutory tort claim Under HRS §663-1, Petitioner asserts that "[the insurers] intentionally caused injury to [Petitioner] and [are] liable to [Petitioner] for damages, according to proof."

In respect to both of the foregoing claims, Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001), also involved a contract which gave rise to the duties allegedly owed by the defendant, the breach of which was the basis for the plaintiffs' tort claim of negligence. There, this court held that the "essential character" of the plaintiffs' action was in the nature of assumpsit. Id. at 332, 31 P.3d at 89. Although this court cited the fact that the plaintiffs' "negligence claim arises out of the alleged implied contract" between the defendant and a third-party in its determination that the action was in the nature of assumpsit, this determination was not based solely on the fact that the negligence claim arose out of the alleged implied contract. Id.

In Blair, the plaintiffs asserted only two claims for relief against the defendant, one of which was a breach of implied contract claim and the other, the negligence claim. Id. Because the number and scope of the tort claims were apparently equal to those of the

assumpsit claims, this court presumably looked to other factors such as the fact that that the negligence claim originated from the breach of duties owed under an implied contract, in order to decide whether the action in general sounded in tort or in contract. Furthermore, this court concluded in Blair that "the damages alleged were more closely akin to contract damages than to tort damages because they were economic damages arising out of the alleged frustrated expectation that [the defendant] would take advantage of certain tax-saving devices." Id. at 332-33, 31 P.3d at 189-90.

In contrast, here, all of Petitioner's claims were tort claims. That the tort claims would not be actionable without the existence of an underlying insurance contract between insurers and employers of Petitioner's clients is an insufficient justification to redefine Petitioner's tort claims as assumpsit claims. In addition, damages sought by Petitioner are more akin to tort damages than contract damages, as they include damages for harm allegedly suffered by Petitioner transcending any contractual obligations such as harm paused to Petitioner's prospective business opportunities with certain clients.

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CLERK, APPELLATE COURTS
STATE OF HAWAI'I

NO. 27281

IN THE INTERMEDIATE COURT OF

APPEALS OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, Plaintiff-Appellant,

ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; and MARRIOT CLAIM SERVICES CORPORATION, a Corporation, Defendants-Appellees,

and.

JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10,
and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 03-1-1445)

JUDGMENT ON APPEAL

(By: Foley, J., for the court[2])

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawaii entered on April 5, 2007, the Judgment of the Circuit

Court of the First Circuit entered on April 22, 2005

is affirmed.

DATED: Honolulu, Hawai'i, August 1, 2007.

FOR THE COURT:

Associate Judge

APPELLATE COURTS SEAL STATE OF HAWAI'I

1/ Foley, Presiding Judge, and Nakamura, J. Former Chief Judge James S. Burns was a member of the panel on this appeal, but has since retired from his judgeship effective the close of business on April 18, 2007.

NO. 27281

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

K. HAMAKADO
CLERK, APPELLATE COURT
STATE OF HAWAI'I

2007 JUL 18 PM 1:

EMERSON M.F. JOU, Plaintiff-Appellant,

v.

ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; and MARRIOT CLAIM SERVICES CORPORATION, a Corporation, Defendants-Appellees,

and:

JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 03-1-1445)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT-APPELLEE HEMIC'S REQUEST FOR ATTORNEY'S FEES AND ORDER GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE, REQUEST FOR COSTS ON APPEAL

(By: Foley, Presiding Judge, and Nakamura, J. 1/)

Appendix C.1

Upon consideration of (1) the April 26, 2007 request?" for attorney's fees in the amount of $9,791.72 and necessary costs of $416.64 submitted by counsel for Defendant-Appellee HEMIC, pursuant to Hawaii Revised Statutes §§ 607-9 and 607-14 and Hawaii Rules of Appellate Procedure (HRAP) Rule 39, and the

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1/ Former Chief Judge James S. Burns was a member of the panel on this appeal, but has since retired from his judgeship effective the close of business on April 18, 2007.

2/ Pursuant to Hawaii Rules of Appellate Procedure (HRAP) Rule 39(d)(1), future requests for attorney's fees should follow the format in HRAP Form 8a for setting forth billed hours.

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memorandum and attachments thereto,, and (2) the memorandum in opposition filed on May 7, 2007 by Plaintiff-Appellant Emerson M.F. Jou, M.D., we conclude that attorney's fees and costs are appropriate, in part; and award the following fees and costs:

(1) Reasonable attorneys fees in the amount of $9,395.00 3/, and

(2) Reasonable and necessary copying costs for the answering brief in the amount of $67.20 (24 pages x $.20/page $4.80 x 14 copies 4/).

Pursuant to Tortorello v; Tortorello, 113 Hawai'i 432, 444, 153 P.3d 1117, 1129 (2007), and ERAP Rule 39(d)(1), HEMIC's request for $120.64 for transcript costs, $129.20 in copying costs, $34.69 for postage, and $48.12 in

messenger costs 5/ is denied without prejudice to HEMIC producing any documentation, receipts, ledger, log, or proof of the amount being charged.

Therefore,

3/ Counsel requests $9,395.00 in attorney's fees and $396.72 in state general excise tax thereon, and $399.85 in costs and $16.79 in state general excise tax thereon. The payment of state general excise tax is not authorized under HRS §§ 607-9 or 607-14 or under Hawai'i Rules of Appellate Procedure
Rule 39.

4/ Pursuant to Tortorello v. Tortorello, 113 Hawaii 432, 444, 153 P.3d 1117, 1129 (2007), Defendant-Appellee HEMIC is entitled to reimbursement for 1.3 copies of the Answering Brief (2 copies for service on each of the parties and 5 copies for the court) plus 1 copy for HEMIC pursuant to Kamalu v. Paren, 100 Hawaii 269, 280, 132 P.3d 378, 389 (2006).

5/ Under Kikuchi v. Brown, 110 Hawai'i 204, 212-13, 130 P.3d 1069, 107778 (API). 2006), messenger fees are treated as overhead and are not billable costs. However, in Buscher v. Boning, __Hawaii ____, 159 P.3d 814 (2007), the Hawai'i Supreme Court awarded costs for an outside delivery service for documents sent from Oahu to the Big Island where the requesting party provided detailed documentation.

IT IS HEREBY ORDERED that attorneys' fees in the amount of $9,395.00 and costs in the amount of $67.20, for a total of $9,462.20, incurred in connection with the appeal are approved and awarded in favor of Defendant-Appellee HEMIC and against Plaintiff-Appellant Emerson M.F. Jou, M.D.

DATED: Honolulu, Hawai`i, July 18, 2007.

On the request:
John Reyes-Burke and
Devin L. Choy
(Burke McPheeters Bordner
& Estes) for Defendant-
Appellee
HEMIC.

Steven M. Shaw
on the objection for
Plaintiff-Appellant.

Presiding Judge

Associate Judge

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NO. 27281

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, Plaintiff-Appellant,
v.
ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; and MARRIOT CLAIM SERVICES CORPORATION, a Corporation, Defendants-Appellees,
and
JOHN DOE 1-50; DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 03-1-1445)

ORDER GRANTING DEFENDANT-APPELLEE MARRIOTT CLAIM SERVICES CORPOIRATION'S REQUEST FOR ATTORNEY'S FEES AND ORDER GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE, REQUEST FOR COSTS ON APPEAL

(By: Foley, Presiding Judge, and Nakamura, J.[1]/)

Appendix D. 1

Upon consideration of (1) the April 27, 2007 request for attorney's fees in the amount of $4,451.50 and necessary costs of $697.68 submitted by counsel for Defendant-Appellee Marriott Claim Services Corporation (Marriott), pursuant to Hawaii Revised Statutes § 607-14 and Hawaii Rules of Appellate Procedure (HRAP) Rule 39, and the memorandum and attachments thereto; (2) the memorandum in opposition filed on May 8, 2007 by Plaintiff-Appellant Emerson M.F. Jou, M.D.; and (3) the May 14, 2007 reply memorandum filed by Marriott, we conclude that attorney's fees and costs are appropriate and award the following fees and costs:

(1) Reasonable attorney 's fees in the amount of $4,451.50,

1/ Former Chief Judge James S. Burns was a member of the panel on this appeal, but as since retired from his judgeship effective the close of business on April 18, 2007.

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(2) Reasonable and necessary copying costs for the answering brief in the amount of $33.80 (167 pages x $.10/page $16.70 x 14 copies 2/), and

(3) Transcript costs of $120.64.

Pursuant to Tortorello v. Tortorello, 113 Hawai'i 432, 444, 153 P.3d 1117, 1129 (2007) and HRAP Rule 19(d)(1), Marriott's request for additional costs of $343.24 is denied without prejudice to Marriott filing an amended request citing to the appropriate statute and producing any documentation, receipts, ledger, log, or proof of the amount being charged.

Therefore,

IT IS HEREBY ORDERED that attorneys' fees in the amount of $4,451.50 and costs in the amount of $354.44, for a total of $4,805.94, incurred in connection with the appeal are approved and awarded in favor of Defendant-Appellee Marriott Claim Services Corporation and against Plaintiff-Appellant Emerson M.F. Jou, M.D.

DATED: Honolulu, Hawaii, July 18, 2007.

On the request:
Richard F. Nakamura and Steven L. Goto (Ayabe, Chong, Nishimoto, Sia & NakaMura) for Defendant-Appellee Marriott Claim Services Corporation.

Steven. M. Shaw on the objection for Plaintiff-Appellant.

Presiding Judge

Associate Judge

2/ Pursuant to Tortorello v. Tortorello, 113 Hawai'i 432, 444, 153 P.3d 1117, 1129 (2007), Defendant-Appellee Marriott is entitled to reimbursement for 13 copies of the Answering Brief (2 copies for service on each of the parties and 5 copies for the court) plus 1 copy for Marriott pursuant to Kamalu v. Paren, 100 Hawai'i 269, 280, 1321 P.3d 378, 389 (2006).

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NO. 27281

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, Plaintiff-Appellant,

v.

ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; and MARRIOT CLAIM SERVICES CORPORATION, a Corporation, Defendants-Appellees,:

and

JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

(CIVIL NO. 03-1-1445)

ORDER GRANTING DEFENDANT-APPELLEE CITY AND COUNTY OF HONOLULU'S REQUEST FOR ATTORNEY'S FEES AND GRANTING IN PART AND DENYING IN PART, WITHOUT PREJUDICE, REQUEST FOR COSTS ON APPEAL

(By: Foley, Presiding Judge, and Nakamura, J. ¼)

Appendix E. 1

Upon consideration of (1) the April 27, 2007 request [2/] for attorney's fees in the amount of $6,204.00 and necessary costs of $139.80 submitted by counsel for Defendant-Appellee City and County of Honolulu (CCH), pursuant to Hawaii Revised Statutes §607-14 and Hawaii Rules of Appellate Procedure (HRAP) Rule 39, and the memorandum and attachments thereto; (2) the memorandum in opposition filed on May 8, 2007 by Plaintiff-Appellant Emerson M.F. Jou, M.D.; and (3) the May 15, 2007 reply memorandum filed by CCH, we conclude that attorney's fees and costs are appropriate and award the following fees and costs:

[1/] Former Chief Judge James S. Burns was a member of the panel on this appeal, but has since, retired from his judgeship effective the close of business on April 18, 2007.

[2/] Pursuant to Hawaii Rules of Appellate Procedure (BRAP) Rule 39(d)(1), future requests for attorney's fees should follow the format in HRAP Form 8a for setting forth billed hours.

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(1) Reasonable attorney's, fees in the amount of $6,204.00, and

(2) Reasonable and necessary copying costs for the answering brief in the amount of $71.40 (34 pages x $.15/page = $5.10 x 14 copies [3]).

Pursuant to Tortorello v. Tortorello, 113 Hawaii 432, 444, 153 P.3d 1117, 1129 (2007), and HRAP Rule 39(d)(1), CCH's request for $9.37 in transcript costs, $20.39 for postage, and $38.40 in additional copying costs is denied without prejudice to CCH filing an amended request and producing any documentation, receipts, ledger, log, or proof of the amount being charged.

Therefore,

IT IS HEREBY ORDERED that attorneys' fees in the amount of $6,204.00 and costs in the amount, of $71.40, for a total of $6,275.40, incurred in connection with the appeal are approved and awarded in favor of Defendant-Appellee City and County of Honolulu and against Plaintiff-Appellant Emerson M.F. Jou, M.D.

DATED: Honolulu, Hawaii, July 18, 2007.

On the request:
Steven J.T. Chow and
Jeffrey S. Masatsugu
(The Pacific Law Group)
for Defendant-Appellee
City and County of
Honolulu.

Presiding Judge

Associate Judge

Steven M. Shaw
on the objection for Plaintiff-Appellant.

3/ Pursuant to Tortorello v. Tortorello, 113 Hawaii 432, 444, 153 P.3d 1117, 1129 (2007), Defendant-Appellee CCH is entitled to reimbursement for 13 copies of the Answering Brief (2 copies for service on each of the parties and 5 copies for the court) plus 1 copy for CCH pursuant to Kamalu v. Paren, 100 Hawaii 269, 280, 132 P.3d 378, 389 (2006).

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NOT FOR PUBLICATION IN WEST'S HAWAFI REPORTS AND PACIFIC REPORTER

NO. 27281

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI`I

EMERSON M.F. JOU, Plaintiff-Appellant,
V.
ARGONAUT INSURANCE COMPANY, an Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; and MARRIOT CLAIM SERVICES CORPORATION, a Corporation,. Defendants-Appellees,
and
JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

Appendix F.1

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 03-1-1445)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Foley and Nakamura, JJ.)

Plaintiff-Appellant Emerson M.F. Jou, M.D. (Jou) appeals from the Judgment filed on April 22, 2005 in the Circuit Court of the First Circuit (circuit court) 1/ in favor of Defendants-Appellees Argonaut Insurance Company (Argonaut), City and County of Honolulu (City), HEMIC aka Hawaii Employers Medical Insurance Company (HEMIC), and Marriott Claim Services Corporation (Marriott) (Argonaut City, HEMIC, and Marriott are collectively referred to as Appellees) and against Jou. On appeal, Jou advances thirteen points of error:

(1) Judge Karen Blondin, the circuit court civil Administrative Judge, erred by assigning this case to Judge Gary W.B. Chang when Judge Blondin knew should have known that, prior to becoming a judge, Judge Chang had worked for an insurance defense law firm and had represented the City.

(2) The circuit court erred by denying Jou's motion to disqualify Judge Chang.

(3) The circuit court erred by 'refusing to permit filing of second [Hawaii Revised Statutes (HRS)] § 601-7 [(1993)] declaration to disqualify Judge Chang and to vacate orders made by the

Footnote

1/ The Honorable Gary W.B. Chang presided.

judge grounded on [Jou's] discovery that Judge Chang previously represented [the City), and made an ex parte contact with its counsel, for violations of [the Fourteenth Amendment to the United States Constitution and Article I, § 5 of the Hawai`i Constitution], and the possibility of future employment."

(4) The circuit court erred by denying Jou's motion to amend the complaint.

(5) The circuit court erred by denying Jou's motion for summary judgment.

(6) The circuit court erred by granting the City's motion for summary judgment, joined by Marriott.

(7) The circuit court violated Jou's rights under the petition clause of the First Amendment to the United States Constitution by ruling in favor of the City and Marriott on Jou's tort claims.

(8) The circuit court violated Jou's rights under the petition clause of the First Amendment to the United States Constitution "by implicitly finding in favor of [the City], joined by [Marriott], that the action by the department of Labor in favor of [the City] (only) was justification for [the City] not paying [Jou]."

(9) The circuit court violated Jou's rights to due process and equal protection by refusing to grant a continuance of the summary judgment hearing to permit the deposition of state official.

Appn F. 3

(10) The circuit court erred by granting HEMIC's motion for summary judgment.

(11) The circuit court erred and violated Jou's constitutional rights by 'granting the Appellees' motions for attorneys' fees and thereby Violated ',other constitutional provision8 including the separation Of power8 doctrine; ad hoc rule-making violating the state and federal constitution; [the Fourteenth Amendment to the United States Constitution] and the due process clause of the state and federal constitutions." The circuit court also violated the takings clause of the Fifth Amendment to the United States Constitution, "and deprived [Jou] of meaningful remedies, in violation of [the] due process and equal protection Clause[s] of the [Fourteenth Amendment to the United States Constitution and Article I § 5 of the Hawaii Constitution].

(12) The circuit court erred "by refusing to give its novel application of HRS § 607-14 [Supp. 2006] prospective effect because substantial prejudice would befall [Jou]; instead, the court applied HRS §607-14 retrospectively to [Jou]."

(13) The circuit court erred by denying Jou's motions for reconsideration of the attorneys' fee orders.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that Jou's points of error are without merit.

Therefore,

The Judgment filed on April 22, 2005 in the Circuit Court of the first Circuit is affirmed.

DATED: Honolulu, Hawaii, April 5, 2007.

On the briefs:

Stephen M. Shaw
for Plaintiff-Appellant.

Steven J.T. Chow and Jeffrey S. Masatsugu (The Pacific Law Group) for Defendant-Appellee
City and County of Honolulu.

John Reyes7Burke
(Burke McPheeters Bordner & Estes) for
Defendant-Appellee HEMIC.

Richard F. Nakamura and
Steven L. Goto
(Ayabe, Chong, Nishimoto, Sia & Nakamura)
for Defendant-Appellee
Marriott Claim Services Corporation

Chief Judge

Associate Judge

Associate Judge

1575-132 FILED 2005 APR 22

Of Counsel:
BURKE, SAKAI, McPHEETERS, BORDNER, IWANAGA & ESTES

EDMUND BURKE 704-0 PATRICIA C. ABURANO 3598-0 JOHN REYES-BURKE 6251-0 Suite 3100 - Mauka Tower Pacific Guardian Center
737 Bishop Street
Honolulu, Hawaii 96813 Telephone No. (808) 523-9833
Fax No. (808) 528-1656
Attorneys for Defendant HEMIC

PLEASE NOTE CHANGES

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

JUDGMENT

Pursuant and the following orders:

(1) The Order Granting Defendant Argonaut Insurance Company's Motion TO Dismiss Complaint, Or, In The Alternative, To Sever Claims, Filed On August 27, 2003, entered herein on December 10, 2003;

(2) the Order Granting Defendant City and County Of Honolulu's Motion For Summary Judgment Filed On February 24, 2004 and Defendant Marriott Claims Services Corporation's Substantive Joinder in Defendant City And County Of Honolulu's Motion For Summary Judgment Filed February 24, 2004, filed on March 11, 2004, entered herein on May 14, 2004; and

(3) The Order Granting Defendant HEMIC's Motion for Summary Judgment Filed On May 12, 2004, entered herein on August 5, 2004;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant ARGONAUT INSURANCE COMPANY, CITY AND COUNTY OF HONOLULU, HEMIC aka Hawaii Employers Medical Insurance Company, and MARRIOTT CLAIM SERVICES CORPORATION (hereafter collectively "Defendants") and against Plaintiff EMERSON M.F. JOU, M.D. (hereafter "Plaintiff") as to all claims made in the Complaint filed herein on July 11, 2003.

It is further ordered that attorneys fees and costs are hereby awarded against Plaintiff and in favor of the Defendants as follows:

Pursuant to the Order Granting Defendant Argonaut Insurance Company's Motion for Attorneys' Fees filed September 14, 2004, entered on 01/18/05, $12,500 in attorneys' fees is awarded to Defendant ARGONAUT INSURANCE COMPANY;

Pursuant to the Order Granting Defendant City and County Of Honolulu's Motion for Attorneys' Fees Filed on August 2, 2004, entered on 08/31/04, $5,321.50 in attorneys' fees, and $238.69 in costs is awarded to Defendant CITY AND COUNTY OF HONOLULU

Pursuant to the Order Granting Defendant HEMIC's Motion For Reconsideration Regarding HEMIC's Motion for Attorneys' Fees Filed on August 25, 2004, entered on march 21, 2005, $8,750.00 in attorneys' fees and $833.20 in costs is awarded to Defendant HEMIC aka Hawaii Employers Medical Insurance Company.

There are no remaining claims, cross-claims, counterclaims, or parties. Post-judgment interest shall accrue on monetary amounts awarded in this judgment as provided by law. ***Any and all remaining claims are dismissed with prejudice (GWBChang)***

DATED: Honolulu, Hawaii, **APR 21, 2005.**

PLEASE NOTE CHANGES

IT IS SO ORDERED:

GARY W.B.CHANG
HONORABLE GARY W.B.CHANG

Appn G. 3

APPROVED AS TO FORM:

STEPHEN M. SHAW, ESQ.
Attorney for Provider-Appellant
EMERSON M.F. JOU, M.D.

PATRICK K. KELLY
PATRICK K. KELLY, ESQ.
Attorney for Defendant
CITY AND COUNTY OF HONOLULU

STEVEN L. GOTO, ESQ.
STEVEN L. GOTO, ESQ.
Attorney for Defendant
MARRIOTT CLAIM SERVICES CORPORATION

BRAD S. PETRUS, ESQ.
BRAD S. PETRUS, ESQ.
Attorney for Defendant
ARGONAUT INSURANCE COMPANY

Jou v. Argonaut Insurance Company, et al.;
Civil No. 03-1-1445-07, Circuit Court of the First Circuit;
FINAL JUDGMENT

FILED
2005 MAR 21 PM 4:06

1575-132
Of Counsel:
BURKE, SAKAI, McPHEETERS, BORDNER,
IWANAGA & ESTES

PATRICIA C. ABURANO 3598-0
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Telephone No. (808) 523-9833
Fax No. (808) 528-1656
Attorneys for Defendant HEMIC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07 (GWBC)
vs.	)	(Other Non Vehicle Tort)
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES	)	

Appendix H. 1

CORPORATION, A Corporation; JOHN)
DOE 1-50, DOE ATTORNEYS 1-50,)
DOE CORPORATIONS 1-10,)
DOE PARTNERSHIPS1-10, and DOE)
GOVERNMENTAL ENTITIES 1-10,)
Defendants.)

ORDER GRANTING DEFENDANT HEMIC'S MOTION FOR RECONSIDERATION REGARDING HEIOC'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 25, 2004

Defendant HEMIC's MOTION FOR RECONSIDER REGARDING HEMIC'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 25, 2004 came on for hearing in the normal course before the Honorable Gary W.B. Chang on August 25, 2004, on November 8, 2004, at 3:00 p.m. Stephen Shaw, Esq. appeared on behalf of Plaintiff Emerson Jou, M.D., Patrick Kelly, Esq. appeared on behalf of Defendant City and County of Honolulu, Brad Petrus appeared on behalf of Defendant Argonaut Insurance Company, and John Reyes-Burke appeared on behalf of Defendant HEMIC. No other party appeared at the hearing.

The Court having considered the submissions of the parties and the records and files herein, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that HEMIC's Motion For Reconsideration Regarding HEMIC's Motion For Attorneys' Fees Filed

On August 25, 2004 is GRANTED, and the Court awards to Defendant HEMIC its requested attorneys' fees in the amount of Eight Thousand Seven Hundred and Fifty Dollars ($8,750.00).

DATED: Honolulu, Hawaii, MAR 21, 2005.

IT IS SO ORDERED:

GARY W.B.CHANG
HONORABLE GARY W.B.CHANG

Approved as to form:

Stephen M. Shaw, Esq.
Attorney for Provider-Appellant
EMERSON M.F. JOU, M.D.

PATRICK K. KELLY
Patrick K. Kelly, Esq.
Attorney for Defendant
City and County of Honolulu

BRAD S. PETRUS, ESQ.
BRAD S. PETRUS, ESQ.
Attorney for Defendant
ARGONAUT INSURANCE COMPANY

Jou v. Argonaut Insurance Company, et al.;
Civil No. 03-1-1445-07 (GWBC)

ORDER GRANTING DEFENDANT HEMIC'S MOTION FOR RECONSIDERATION REGARDING HEMIC'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 25, 2004

TOM PETRUS & MILLER, LLLC

• FILED •
2005 FEB 16 AM 11:12

BRAD S. PETRUS 4586-0
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Attorneys for Defendant
ARGONAUT INSURANCE COMPANY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

Appendix I. 1

ORDER DENYING PLAINTIFF EMERSON M.F. JOU, M.D.'S MOTION FOR LEAVE TO FILE SECOND DECLARATION PURSUANT TO HRS §601-7 TO DISQUALIFY AND TO VACATE ORDERS MADE BY THE HONORABLE GARY W.B. CHANG, FILED ON JANUARY 3, 2005

Plaintiff EMERSON M.F. JOU, M.D.'s Motion For Leave to File Second Declaration Pursuant To HRS 601-7 to Disqualify and to Vacate Orders Made by The Honorable Gary W.B. Chang, filed on January 3, 2005, having come on for hearing before The Honorable Gary W.B. Chang on January 26, 2005, and Stephen M. Shaw having appeared for the Plaintiff EMERSON M.F. JOU, M.D., Brad S. Petrue having appeared for Defendant ARGONAUT INSURANCE COMPANY, Steven L. Goto having appeared for Defendant MARRIOTT CLAIM SERVICES CORPORATION, John Reyes-Burke having appeared for Defendant HEMIC, and Patrick K. Kelly having appeared for Defendant CITY AND COUNTY OF HONOLULU, the Court having considered the written and oral submissions of counsel and the record and files herein, and being otherwise fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff EMERSON M.F. JOU, M.D.'s Motion For Leave to File Second Declaration Pursuant To HRS §601-7 to Disqualify and to Vacate Orders Made by The Honorable Gary W.B. Chang, filed on January 3, 2005, be and is hereby DENIED.

DATED: Honolulu, Hawaii, FEB 15, 2005.

GARY W. B. CHANG SEAL
JUDGE OF THE ABOVE-ENTITLED COURT

THE PACIFIC LAW GROUP
Attorneys At Law, A Law Corporation

STEVEN J. T. CHOW 2927-0
PATRICK K. KELLY 7290-0
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Telephone No.: 523-2999

Attorneys for Defendant CITY AND COUNTY OF HONOLULU

FILED
2004 NOV 30 PM 4:07

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

Appendix J. 1

ORDER DENYING "PLAINTIFF ERSON M.F. JOU, M.D.'S MOTION FOR RECONSIDERATION; OR FOR RELIEF FROM ORDERS (1) GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 2, 2004, AND (2) GRANTING DEFENDANT HEMIC'S JOINDER TO DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEY'S FEES" FILED ON SEPTEMBER 9, 2004

Plaintiff EMERSON M. F. JOU, M.D., having moved this Honorable Court for reconsideration or for relief from the Order: granting Defendant CITY AND COUNTY OF HONOLULU's Motion for Attorneys' Fees and Defendant HEMIC's joinder therein, said Orders being filed on August 31, 2004;

Said Motion having come for hearing on November 8, 2004, at 3:00 p.m., before the Honorable Gary W. B. Chang, Judge of the above-entitled Court; Plaintiff being represented by Stephen M. Shaw, Esq.; Defendant CITY AND COUNTY OF HONOLULU being represented by Patrick K. Kelly, Esq.; Defendant ARGONAUT INSURANCE COMPANY being represented by Brad S. Petrus, Esq.;

Defendant HEMIC being represented by John N.K. Reyes-Burke, Esq.; Defendant MARRIOTT CLAIM SERVICES CORPORATION having filed a Statement of No Position and Non-Appearance; the Court having reviewed the records and files herein, heard the arguments of counsel, and being duly advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff EMERSON M. F. JOU, M.D.'s Motion for Reconsideration; or for Relief from Orders (1) Granting Defendant City and County of Honolulu's Motion for Attorneys' Fees Filed on August 2, 2004, and (2) Granting Defendant HEMIC's Joinder to Defendant City and County of Honolulu's Motion for Attorney's Fees is DENIED.

DATED: Honolulu, Hawaii, _____.

_____

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

STEPHEN M. SHAW
Attorney for Plaintiff
EMERSON M. F. JOU, M.D.

BRAD S. PETRUS
BRAD S. PETRUS
Attorney for Defendant
ARGONAUT INSURANCE COMPANY

JOHN N.K. REYES-BURKE
Attorney for Defendant
HEMIC

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Attorneys for Defendant CITY AND COUNTY OF HONOLULU

FILED
2004 AUG 31 PM 3:54

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

Appendix K. 1

ORDER GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR ATTORNEYS' FEES FILED ON AUGUST 2, 2004

Defendant CITY AND COUNTY OF HONOLULU, having moved this Honorable Court for an Order awarding attorneys' fees;

Said Motion having regularly come for hearing on August 25, 2004, at 3:00 p.m., before the Honorable Gary W. B. Chang, Judge of the above-entitled Court; Defendant CITY AND COUNTY OF HONOLULU being represented by Patrick K. Kelly, Esq.; Defendant HEMIC being represented by John N.K. Reyes-Burke, Esq and no other party appearing; the Court having reviewed the records and files herein, heard the arguments of counsel, and being duly advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant CITY AND COUNTY OF HONOLULU's Motion for Attorneys' Fees is GRANTED and Defendant CITY AND COUNTY OF HONOLULU is hereby awarded attorneys' fees in the amount of $5,321.50.

DATED: Honolulu, Hawaii, _____.

_____

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JOHN N.K. REYES-BURKE
Attorney for Defendant
HEMIC

AYABE, CHONG, NISHIMOTO, SIA & NAKAMURA
A Limited Liability Law Partnership

FILED
2004 AUG 31 AM 11:08

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Attorneys for Defendant MARRIOTT CLAIM SERVICES CORPORATION, A Corporation

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

Appendix L. 1

ORDER GRANTING DEFENDANT MARRIOTT CLAIMS SERVICE CORPORATION'S SUBSTANTIVE JOINDER IN DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 24, 2004, FILED HEREIN ON MARCH 11, 2004

The matter of Defendant MARRIOTT CLAIMS SERVICE CORPORATION'S Substantive Joinder to Defendant City and County of Honolulu's Motion for Summary Judgment, filed February 24, 2004, filed on March 11, 2004, having come on for hearing before the Honorable Gary Won Bae Chang on April 2, 2004, at 10:30 a.m., and Stephen M. Shaw, Esq, appeared on behalf of Plaintiffs, Steven L. Goto, Esq., appeared on behalf of Defendant Marriott Claims Service Corporation, John Reyes-Burke, Esq. appeared on behalf of Defendant HEMIC, and Patrick Kelly, Esq., having appeared on behalf of Defendant the City and County of Honolulu, and the Court having fully considered Defendant The City and County of Honolulu's Motion for Summary Judgment, Memorandum in Support of Motion,' Supporting Declaration and Exhibits attached thereto, Defendant Marriott Claims Services Corporation's Substantive Joinder and the oral arguments in support of, and in Opposition thereto, and the records and files herein, and the Court being fully apprised in the premises,

IT IS HEREBY ORDERED that Defendant Marriott Claims Services Corporation's Substantive Joinder to Defendant City and County of Honolulu's Motion for Summary Judgment, filed on February 24, 2004, filed herein on March 11, 2004 is GRANTED.

DATED: Honolulu, Hawaii, **AUG 30, 2004**.

GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

STEPHEN M. SHAW, ESQ. Attorney for Plaintiff
EMERSON M.F. JOU, M.D.

JOHN REYES-BURKE, ESQ.
Attorneys for Defendant
HEMIC

PATRICK K. KELLY, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

Emerson M.F. Jou, M.D., Plaintiff, V. Argonaut Insurance Company, et al.; Civil No.: 03-11445-07; ORDER GRANTING DEFENDANT MARRIOTT CLAIMS SERVICE CORPORATION'S SUBSTANTIVE JOINDER IN DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 24, 2004.

1575-132

Of Counsel:
BURKE, SAKAI, McPHEETERS,
BORDNER, IWANAGA & ESTES

FILED
2004 AUG 31 PM 4:00

PATRICIA C. ABURANO 3598-0
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Fax No. (808) 528-1656
Attorneys for Defendant
HEMIC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07 (GWBC)
vs.	)	(Other Non Vehicle Tort)
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	

Appendix M. 1

ORDER GRANTING DEFENDANT HEMIC'S JOINDERTO DEFENDANT CITY AND COUNTY OF HONOLULU'SMOTION FOR ATTORNEYS' FEES FILED. ON AUGUST 2, 2004

Defendant City and County of Honolulu's Motion For Attorneys' Fees filed on August 2, 2004, came on for hearing in the normal course before the Honorable Gary W.B. Chang on August 25, 2004, at 3:00 p.m. Patrick K. Kelly, Esq. appeared on behalf of Defendant City and County of Honolulu, and John Reyes-Burke appeared on behalf of Defendant HEMIC. No other party appeared at the hearing.

The Court having considered the submissions of the parties and the records and files herein, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that HEMIC's joinder in Defendant City and County of Honolulu's Motion For Attorneys' Fees filed on August 2, 2004 is GRANTED.

DATED: Honolulu, Hawaii, AUG 31, 2004 .

GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

SEAL

APPROVED AS TO FORM:

PATRICK K. KELLY, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

Appn M. 2

1575-132
Of Counsel:
BURKE, SAKAI, McPHEETERS,
BORDNER, IWANAGA & ESTES

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Attorneys for Defendant
HEMIC

FILED
2004 AUG 5 AM 11:19

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07
vs.	)	(GWBC)
	)	(Other Non
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Vehicle Tort)

Appendix N. 1

ORDER GRANTING DEFENDANT HEMIC'S MOTION FOR SUMMARY JUDGMENT FILED ON MAY 12, 2004

Defendant HEMIC's Motion For Summary Judgment filed on May 12, 2004, came on for hearing in the normal course before the Honorable Gary W.B. Chang on June 18, 2004. Stephen M. Shaw, Esq. appeared on behalf of Plaintiff Emerson M.F. Jou, M.D., Patrick K. Kelly, Esq. appeared on behalf of Defendant City and County of Honolulu, and John Reyes-Burke appeared on behalf of Defendant/Movant HEMIC.

The Court having considered the submissions of the parties and the arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that HEMIC's Motion For Summary Judgment filed on May 12, 2004 is GRANTED.

DATED: Honolulu, Hawaii, AUG 04, 2004.

GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

STEPHEN M. SHAW, ESQ.
Attorney for Plaintiff EMERSON M.F. JOU, M.D.

PATRICK K. KELLY, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

Appn N. 2

THE PACIFIC LAW GROUP
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STEVEN J. T. CHOW 2927-0
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Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

FILED
2004 MAY 14 PM 3:43

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff, vs. ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Civil No. 03-1-1445-07 (GWBC) (Other Non Vehicle Tort)

Appendix O. 1

ORDER GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT FILED ON FEBRUARY 24, 2004

Defendant CITY AND COUNTY OF HONOLULU, having moved this Honorable Court for an Order granting summary judgment on all causes of action against it;

Said Motion having regularly come for hearing on April 2, 2004, at 10:30 a.m. before the Honorable Gary W. B. Chang, Judge of the above-entitled Court; Plaintiff being represented by Stephen M. Shaw, Esq.; Defendant CITY AND COUNTY OF HONOLULU being represented by Patrick K. Kelly, Esq.; Defendant MARRIOT CLAIM SERVICES CORPORATION being represented by Steven L. Goto, Esq.; Defendant HEMIC being represented by John N.K. Reyes-Burke, Esq.; the Court having reviewed the records and files herein, heard the arguments of counsel, and being duly advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant CITY AND COUNTY OF HONOLULU's Motion for Summary Judgment is GRANTED.

DATED: Honolulu, Hawaii, MAY 14, 2004 .

GARY W.B. CHANG

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JOHN N.K. REYES-BURKE

STEPHEN M. SHAW
Attorney for Plaintiff
EMERSON M.F. JOU, M.D.

JOHN N.K. REYES-BURKE
Attorney for Defendant
HEMIC

STEVEN L. GOTO

STEVEN L. GOTO
Attorney for Defendant
MARRIOT CLAIM SERVICES CORPORATION

Appn O. 3

1575-132

Of Counsel:

BURKE, SAKAI, McPHEETERS, BORDNER, IWANAGA & ESTES

FILED
2004 APR 15 AM 11:20

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Attorneys for Defendant
HEMIC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07
vs.	)	(GWBC)
	)	(Other Non
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	Vehicle Tort)

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS CITY AND COUNTY OF HONOLULU, MARRIOTT CLAIMS SERVICES CORPORATION AND HEMIC, FILED FEBRUARY 17, 2004, AND DENYING WITHOUT PREJUDICE DEFENDANT MARRIOTT CLAIMS SERVICES CORPORATION'S MOTION FOR SUMMARY JUDGMENT FILED ON MARCH 11, 2004

Plaintiff Emerson M. F. Jou, M.D.'s ("Plaintiff's") Motion For Summary Judgment As To Defendants City And County of Honolulu, Marriott Claims Services Corporation, and HEMIC, filed on February 17, 2004, and Defendant Marriott Claims Services Corporation's request for summary judgment made on March 11, 2004, came on for hearing before the Honorable Gary W. B. Chang, on March 19, 2004. Stephen M. Shaw appeared for Plaintiff, Steven L. Goto appeared for Defendant Marriott Claims Services Corporation, Patrick K. Kelly appeared for Defendant City and County of Honolulu, and John Reyes-Burke appeared for Defendant HEMIC.

After reviewing the submissions and arguments of the parties, the Court is unable to conclude there are no disputed issues of material fact, or that the Movant is entitled to judgment as a matter of law.

IT IS HEREBY ORDERED that Plaintiff's above-described Motion is DENIED.

With respect to the request for summary judgment made by Marriott Claims Services Corporation, the Court finds that the request made on March 11, 2004 does not afford the requisite period of notice, and therefore the Court DENIES Marriott's above-described request for judgment WITHOUT PREJUDICE.

DATED: Honolulu, Hawaii, APR 13, 2004.

GARY W. B. CHANG
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

STEPHEN M. SHAW, ESQ.
Attorney for Plaintiff
EMERSON M.F. JOU, M.D.

STEVEN L. GOTO
STEVEN L. GOTO
Attorney for Defendant
MARRIOT CLAIM SERVICES CORPORATION

PATRICK K. KELLY.
PATRICK K. KELLY, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

JOHN REYES-BURKE
JOHN REYES-BURKE
Attorney for Defendant
HEMIC

1575-132

Of Counsel:
BURKE, SAKAI, McPHEETERS,
BORDNER, IWANAGA & ESTES

FILED
2004 APR 15 AM 11:20

EDMUND BURKE 704-0
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Attorneys for Defendant
HEMIC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07 (GWBC)
vs.	)	(Other Non Vehicle Tort)
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	

ORDER DENYING PLAINTIFF EMERSON M. F. JOU, M.D.'S MOTION TO DISQUALIFY THE HONORABLE GARY W.B. CHANG ON CONSTITUTIONAL GROUNDS, FILED FEBRUARY 17, 2004

Plaintiff Emerson M. F. Jou, M.D.'s ("Plaintiff's") Motion To Disqualify The Honorable Gary W.B. Chang On Constitutional Grounds, filed herein on February 17, 2004 ("Motion to Disqualify"), came on for hearing in the normal course before the Honorable Gary W. B. Chang on March 19, 2004. Stephen M. Shaw appeared for Plaintiff, Steven L. Goto appeared for Defendant Marriott Claims Services Corporation, Patrick K. Kelly appeared for Defendant City and County of Honolulu, and John Reyes-Burke appeared for Defendant HEMIC.

After due consideration of the submissions and the arguments of the parties,

IT IS HEREBY ORDERED that Plaintiff's Motion to Disqualify is DENIED.

DATED: Honolulu, Hawaii, **APR 13, 2004**.

GARY W. B. CHANG SEAL
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

STEPHEN M. SHAW, ESQ.
Attorney for Plaintiff
EMERSON M.F. JOU, M.D.

STEVEN L. GOTO
STEVEN L. GOTO
Attorney for Defendant
MARRIOT CLAIM SERVICES CORPORATION

PATRICK K. KELLY.
PATRICK K. KELLY, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

JOHN REYES-BURKE
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Plaintiff,	)	Civil No. 03-1-1445-07 (GWBC)
vs.	)	(Other Non Vehicle Tort)
ARGONAUT INSURANCE COMPANY, An Entity, Form Unknown; CITY AND COUNTY OF HONOLULU, A Self-Insured Governmental Entity; HEMIC, aka Hawaii Employers Medical Insurance Company, An Entity, Form Unknown; And MARRIOTT CLAIM SERVICES CORPORATION, A Corporation; JOHN DOE 1-50, DOE ATTORNEYS 1-50, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS1-10, and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	)	

ORDER DENYING PLAINTIFF EMERSON M.F. JOU, M.D.'S MOTION FOR LEAVE TO AMEND COMPLAINT FILED ON SEPTEMBER 25, 2003

Plaintiff EMERSON M.F. JOU, M.D. ("Jou"), by and through his attorney, filed a Motion for Leave to Amend Complaint herein on September 25, 2003 (hereinafter "Plaintiff Jou's Motion"). Defendants ARGONAUT INSURANCE COMPANY and CITY AND COUNTY OF HONOLULU, by and through their respective counsel, filed Memoranda in Opposition to Plaintiff Jou's Motion on October 6, 2003 and October 7, 2003, respectively. Defendants HEMIC and MARRIOTT CLAIM SERVICES CORPORATION, by and through their respective counsel, filed Joinders to Defendant Argonaut Insurance Company's Memorandum in Opposition to Plaintiff Jou's Motion. Plaintiff Jou's Motion is a non-hearing Motion.

The Court, having reviewed Plaintiff Jou's Motion and the Memoranda in Opposition to Plaintiff Jou's Motion and being duly advised of the record and file herein, for good cause appearing therefor hereby ORDERS, ADJUDGES AND DECREES that Plaintiff EMERSON M.F. JOU, M.D.'s Motion for Leave to Amend Complaint filed herein on September 25, 2003 be and is hereby DENIED on the grounds of futility.

DATED: Honolulu, Hawaii, DEC 16, 2003.

GARY W. B. CHANG

JUDGE OF THE ABOVE-ENTITLED COURT

Appn R. 2